

support, Bergenfield submits documentation indicating that Dela-Cruz was appointed, and reappointed, to three-year terms as Deputy Registrar of Vital Statistics.²

Additionally, Bergenfield states that Keeley commenced employment with the Building Department on January 7, 2014. It states that the current department head confirmed that Keeley has been working in the capacity of Elevator Subcode Official and Elevator Inspector since that time. As such, Bergenfield maintains that its intent was to provisionally appoint Keeley to both titles in 2014, and it also requests that Keeley be placed permanently in both titles without examinations.³ In support, Bergenfield submits Council resolutions reflecting Keeley's appointment to both titles, effective January 7, 2014.

The Division of Agency Services (Agency Services) notes that all titles in question in these matters are currently in the competitive division and were in the competitive division at the time of the appointments. Agency Services states that Bergenfield has not presented a sufficient basis to waive examination procedures and provide Dela-Cruz and Keeley with retroactive dates of permanent appointment. However, Agency Services states that Bergenfield provided ample evidence that Keeley was appointed to Elevator Subcode Official and Elevator Inspector on January 7, 2014. It notes that there were no active eligible lists for any of the titles in question in these matters at the time of the appointments. As such, Agency Services recommends that Keeley be considered serving provisionally in the titles of Elevator Subcode Official and Elevator Inspector, pending open-competitive examination procedures, effective January 7, 2014, and that Dela-Cruz's provisional appointment to Deputy Registrar of Vital Statistics remain unaltered.

CONCLUSION

N.J.A.C. 4A:4-1.10(a) provides that all initial and subsequent appointments, promotions and related personnel actions in the career, unclassified or senior executive service are subject to the review and approval of this agency.

Upon review, the Civil Service Commission (Commission) finds it appropriate to authorize the retroactive provisional appointments, effective January 7, 2014, of Keeley to the titles of Elevator Subcode Official and Elevator Inspector, pending open-competitive examination procedures. In this regard, Bergenfield's supporting documentation, namely resolutions of the Council, support that it effected these

² However, *N.J.S.A.* 26:8-20 provides that the provisions of *N.J.S.A.* 26:8-1 *et seq.* fixing the terms of office and providing methods of appointment and removal shall not apply to the positions of local registrar, deputy registrar, alternate deputy registrar or subregistrar in municipalities operating under the provisions of the Civil Service Act.

³ Keeley does not appear in CAMPS.

appointments. Bergenfield states that Keeley has been performing the duties of the titles since January 7, 2014.⁴ However, there is no indication that Bergenfield informed this agency at that time that it made the appointments or that it requested the announcement of open-competitive examinations. In light of the foregoing, it is appropriate to announce open-competitive examinations for the titles of Elevator Subcode Official and Elevator Inspector in accordance with the provisions of *N.J.A.C.* 4A:4-2.3. The remedy provided is limited to the specific circumstances of this case and shall not be utilized as a precedent in any other proceeding.

Nevertheless, the Commission finds that Dela-Cruz and Keeley are not entitled to retroactive dates of permanent appointment. Although Bergenfield maintains that the employees should not have to take examinations to become eligible for permanent appointments to titles the duties of which they have been performing since January 17, 2003 and January 7, 2014, respectively, the Commission is not persuaded for the reasons discussed below.

In *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987), our Supreme Court concluded that a long-term provisional employee was not entitled to retain his provisional position without complying with the examination procedures set forth in *N.J.S.A.* 11A:1-1 *et seq.* In *O'Malley*, the employee provisionally occupied a position for more than two years before he was returned to his former permanent title. No examination was conducted during this time period. The employee contended that the failure to give a timely examination vested him with the automatic right to retain his provisional position. The Court rejected this claim:

Neither the original act nor the 1986 Act expressly created such a right in favor of provisional employees. In addition, nothing in the legislative history suggests that the Legislature intended to create such a right. It is the welfare of the public, not that of a particular provisional employee, that underlies civil service legislation. We believe it would thwart the legislative intent to allow a provisional employee to retain his or her position merely because the Commission could not offer a timely test.

* * *

In the present case, however, we are persuaded that the legislative goal of appointments based on merit and fitness is the paramount consideration. *With respect to provisional employees, that goal is met by competitive examinations, not by holding a position beyond the time prescribed by the Legislature.* *Id.* at 316-317 (emphasis added).

⁴ The Commission is making no finding in this decision that Keeley in fact meets the open-competitive requirements of the titles.

In *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), the court determined that the City of East Orange's (East Orange) actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy:

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. *Id.* at 532-533.

Accordingly, the court transferred the case to this agency to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, the former Merit System Board determined that, notwithstanding Kyer's years of service or the misdeeds of East Orange, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999).

In this matter, Dela-Cruz and Keeley cannot be considered to be permanent employees simply because they occupied their positions as long-term provisional employees. *See e.g., N.J.S.A. 11A:4-13a* (permanent appointment can only be achieved when an individual takes an examination, is placed on an eligible list and is permanently appointed from that eligible list). Dela-Cruz and Keeley had no property interests in their provisional positions that would give them mandatory rights to permanent appointments. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494, 497 (App. Div. 1990) (a candidate on an eligible list only has an expectancy interest in appointment); *In re Crowley*, 193 N.J. Super. 197, 210 (App. Div. 1984) ("[t]he only benefit inuring to such a person is that so long as that list remains in force, no appointment can be made except from that list."); *see also, N.J.A.C. 4A:4-4.8(a)3* (appointing authority may choose any of the top three eligibles for permanent appointment).

The facts in this matter are distinguishable from those in *Kyer*. In this regard, there is no indication in the record that Dela-Cruz and Keeley were ever

informed that they had become permanent in their positions. Kyer, in contrast, had been *specifically erroneously informed* by her employer that she was a permanent employee. Accordingly, Bergenfield has not established that Dela-Cruz and Keeley are entitled to retroactive permanent appointments, but as already discussed, they are being afforded examination opportunities.

As a final matter, the Commission has concerns with the failure to previously report the appointments of Dela-Cruz and Keeley. *See N.J.A.C. 4A:4-1.10(a)*. While the Commission recognizes Bergenfield's effort to correct past mistakes and omissions, it should also take steps to ensure that this does not happen in the future.

ORDER

Therefore, it is ordered that the provisional appointments of Richard F. Keeley to the titles of Elevator Subcode Official and Elevator Inspector, pending open-competitive examination procedures, effective January 7, 2014, be recorded. It is further ordered that open-competitive examinations for these titles be announced in accordance with this decision.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF JUNE, 2019



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